

On October 25, 1920, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

E. D. BALL, *Acting Secretary of Agriculture.*

**8727. Alleged adulteration and misbranding of tomatoes. U. S. * * *
v. 154 Cases of Tomatoes. Motion of claimant to dismiss the libel
sustained. (F. & D. No. 12217. I. S. No. 971-r. S. No. E-1999.)**

On March 3, 1920, the United States attorney for the Western District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 154 cases of canned tomatoes, remaining in the original unbroken packages at Pittsburgh, Pa., alleging that the article had been shipped by the Phillips Packing Co., Cambridge, Md., on or about December 11, 1919, and transported from the State of Maryland into the State of Pennsylvania, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part, "Castle Haven Brand Tomatoes Packed by Phillips Packing Co., Cambridge, Md. U. S. A."

Adulteration of the article was alleged in the libel for the reason that tomato pulp had been mixed and packed with, and substituted wholly or in part for, the article.

Misbranding was alleged for the reason that the labels contained the statement "Tomatoes" and a cut of a ripe tomato, which were false and misleading and deceived and misled the purchaser, and for the further reason that the article was an imitation of, and was sold under the distinctive name of, another article.

On March 29, 1920, the said Phillips Packing Co. filed its motion to dismiss the libel, and on July 26, 1920, the matter having come on for disposition, said motion was sustained as will more fully appear from the following opinion by the court (Orr, *D. J.*):

This is a proceeding instituted by the United States for the seizure and condemnation of 154 cases of canned tomatoes, upon the ground that they have been adulterated and misbranded, in violation of the Food and Drugs Act. The Phillips Packing Company, which is named in the libel as the shipper, has presented its motion to dismiss the libel for the reason that it does not set forth any facts showing a violation of the act of Congress aforesaid. The libel was signed and filed by the United States attorney. The only affidavit attached to it is by one who says that he is an "inspector of the Bureau of Chemistry, United States Department of Agriculture; that he has read the foregoing libel and the averments contained therein as to his own knowledge are true, except as to those matters and things stated to be of his information and belief, and as to those matters and things he verily believes them to be true." It is unfortunate that there is such a lack of correlation between the affidavit and the libel, that we can not tell what averments in the latter are made upon the knowledge of the affiant and what are made upon his information and belief. There is, therefore, a lack of that certainty of allegation which should always be found in a libel before the property of a citizen should be seized. Turning to the libel, we find a representation to the court that the canned tomatoes are labeled, *inter alia*, as follows: "Castle Haven Brand Tomatoes Our first quality carefully selected Packed for Fine Family Trade Contents weight 2 lbs. Packed by Phillips Packing Co., Cambridge, Md., U. S. A." We find it further represented in the libel "that said article of food as analyzed by the Bureau of Chemistry, Department of Agriculture, United States of America, is shown to be adulterated in violation of said act of Congress commonly known as the Food and Drugs Act, in that tomato pulp has been mixed and packed with and substituted wholly or in part for the article." This is not an averment that tomato pulp has been mixed and packed with and substituted for the article, but is an averment that a certain analysis shows such mixture, packing, and substitution. In other words, there is the averment that a certain analysis will show an adulteration, yet no averment of

the fact of such adulteration. Further, it is a matter of common knowledge that tomato pulp is derived from tomatoes, yet there is no averment that canned tomatoes, according to a custom of the trade, are supposed to be free from tomato pulp. It is provided by the act itself that the proceedings in cases like the present shall conform as nearly as may be to the proceedings in admiralty. We find in General Admiralty Rule No. 23 the provision that, "The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of its suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."

There is not the particularity required of the pleader in admiralty which is required of a pleader at law or in equity, yet where there is to be a seizure of the property of a citizen there should be distinct allegations of fact which, if proved, would justify the seizure. In *du Pont de Nemours & Company v. Vance*, 19 Howard, 162-171 and 172, we find this language in the opinion of the Supreme Court, as delivered by Mr. Justice Curtis: "The rules of pleading in the admiralty court are exceedingly simple and free from technical requirements. It is incumbent on the libellant to propound with distinctness the substantive facts on which he relies," etc. The same views, although greatly elaborated, are expressed in the earlier case of *The Hoppett and Cargo v. United States*, 7 Cranch., 389-393: "It is not controverted, that in all proceedings in courts of common law, either against the person or the thing, for penalties or forfeitures, the allegations that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independently of this allegation, a case may be stated, which shows that the law has been violated. The reference to the statute may direct the attention of the court and of the accused to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession. Does this rule apply to informations in a court of admiralty. It is not contended that all those technical niceties which are unimportant in themselves, and standing only on precedents of which the reason can not be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object, and can not be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents, to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law. It is, upon these and other reasons, the opinion of the court that the information is not made good by the allegation that the offense was committed against the provisions of certain sections of the act of Congress."

Taking up now the charge of misbranding, the representation is made "that said article of food, so designated as aforesaid and analyzed as aforesaid, is also shown to be misbranded in violation of said act of Congress in that labels contain statements 'Tomatoes,' and a cut of a ripe tomato, which are false and misleading and deceive and mislead the purchaser." This averment is insufficient to justify the seizure. There is no allegation in the libel that the contents of the cans are not derived from tomatoes, whether ripe or unripe. There is no averment in the libel that they are not tomatoes of the Castle Haven Brand, whatever that may mean, and there is no averment in the libel that the contents of the cans are not of the first quality available to the packer, and that they had not been carefully selected. The picture of a ripe tomato upon a can can not deceive people into the belief that what is in that can is what is pictured on the label. It indicates merely the source from which the contents of the can may be derived.

The court must reach the conclusion that the libel is insufficient in that it does not contain allegations of substantive facts which clearly show the right of the Government to seize and condemn these canned goods. The great value of the Food and Drugs Act, and its amendments, to the social life of the citizens of the United States must be recognized by all who have given thought to its provisions and its purposes. That value should not be diminished either

by obstacles raised to interfere with its enforcement, or by the disregard of the legal requirements which must be followed in order to reach offenders. The property rights of shippers and other citizens can not be lightly regarded, and before their property can be seized there should be a strict adherence to the provisions of the acts of Congress and to the reasonable rules and regulations to be found in admiralty proceedings.

The motion will be sustained.

E. D. BALL, *Acting Secretary of Agriculture.*

8728. Misbranding of La Nobleza and Sin Igual. U. S. * * * v. Juan Gandara. Plea of guilty. Fine, \$200 and costs. (F. & D. No. 12474. I. S. Nos. 2256-r, 2257-r.)

On June 22, 1920, the United States attorney for the District of New Mexico, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Juan Gandara, Albuquerque, N. Mex., alleging shipment by said defendant, in violation of the Food and Drugs Act, as amended, on or about November 4, 1919, from the State of New Mexico into the State of California, of quantities of articles, labeled in part "La Nobleza" and "Sin Igual," which were misbranded.

Analysis of a sample of La Nobleza by the Bureau of Chemistry of this department showed that it was a hydroalcoholic solution of sugars, emodin-bearing drug extractives and saponin-like glucosides, with faint traces of volatile oil.

It was alleged in substance in the information that this article was misbranded for the reason that certain statements regarding the therapeutic and curative effects thereof, appearing on the label of the bottle containing it, falsely and fraudulently represented it to be effective as a treatment, remedy, and cure for scrofula, cancer, leprosy, syphilis, tuberculosis, and all impurities of the blood and as a preventive of contagious diseases, when, in truth and in fact, it was not.

Analysis of a sample of Sin Igual showed that it was an aqueous fermenting mixture of gum (althea indicated), emodin and acid resin, drug extractives, sugars, a trace of glycyrrhizin, and alcohol.

It was alleged in substance in the information that this article was misbranded for the reason that certain statements regarding the therapeutic and curative effects thereof, appearing on the label of the bottle containing it and contained in the circular accompanying it, falsely and fraudulently represented it to be effective as a treatment, remedy, and cure for gravel, suffocation of the chest, retention of urine, stone in the bladder, yellow fever, jaundice, and diseases of the kidneys, liver, bladder, chest, and womb, when, in truth and in fact, it was not.

On July 26, 1920, the defendant entered a plea of guilty to the information, and the court imposed a fine of \$200 and costs.

E. D. BALL, *Acting Secretary of Agriculture.*

8729. Misbranding of Dr. Cheeseman's Pills. U. S. * * * v. Dr. Cheeseman's * * * Pills. Decree of condemnation and forfeiture. Product released under bond. (F. & D. No. 13853. I. S. Nos. 7837-t, 7838-t. S. Nos. E-2862, E-2863.)

On November 8, 1920, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 8 packages (double strength) and 23 packages (single strength) of Dr. Cheeseman's Female Regulating Pills, remaining in the original unbroken packages at Philadelphia, Pa., consigned by the Kells Co., Newburgh, N. Y., alleging